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IN THE

SUPREME COURT OF THE UNITED STATES

No. 73-1216

RUBY DAVIDSON WALDEN
and
WILLIAM LUTHER WALDEN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A
WRIT OF CERTIORARI

Frank B. Tavenner
1819 H Street,N.W.
Washington, D.C.

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REFERENCE TO REPORTS OF OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The judgment of the United States District Court for the Eastern District of Virginia, Alexandria Division, is not reported, but is appended herewith. The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported but is appended herewith.

GROUNDS OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit handed down its decision on January 10, 1974. Petition for a writ of certionari was filed on February 8, 1974. Jurisdiction is conferred on this Court by reason of 28 USC S1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether it was error for the Circuit Court to refuse to suppress evidence that it found to have been gathered illegally?

2. Whether it was error for the Circuit Court to refuse to decide a properly preserved constitutional question when the resolution of all other issues did not result in a reversal of defendants' convictions.

3. Assuming arguendo this Court will in some way by-pass question number two, did the investigative procedures used by the government to procure evidence leading to defendants' convictions violate the Federal Constitutional guarantees against military intrusion into civilian governmental duties?

4. Whether such evidence obtained in violation of the Federal Constitution must be suppressed.

CONSTITUTIONAL PROVISION

United States Constitution, Article I, Section 8.

"The Congress shall have the power . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."

United States Constituion, Article II, Sectionl.

"The executive power shall be vested in a President of the United States of America."

United States Constitution, Article II, Section 2.

"The President shall be commander-in-chief of the army and navy of the United States."
United States Constitution, Article II, Section 3.

"[The President] shall take care that the laws be faithfully executed."
United States Constitution, Article IV, Section.

"The United States shall guarantee to every state in this Union a Republican form of government and shall protect each of them against invasion: and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."
United States Constitution, Article VI.

"This Constitution, and the laws of the United States which shall be in pursuance thereof: and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law

of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

United States Constitution, Amendment III.

"No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of way, but in a manner to be prescribed by law."

United States Constitution, Amendment V.

"No person shall be . . . deprived of live, liberty or property, without due process of law."

United States Constitution, Amendment IV.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Constitution, Amendment X.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are

reserved to the states respectively, or to the people."

United States Constitution, Amendment XIV.

". . . ; nor shall any State deprive any person of life, liberty or property, without due process of law."

S T A T U T E S

18 USC § 595 Interference by administrative employees of Federal, State, or Territorial Governments

> Whoever, being a person employed in any administrative position by the United States, or by any department or agency thereof, or by the District of Columbia or any agency or instrumentality thereof, or by any State, Territory, or Possession of the United States, or any political subdivision, municipality, or agency thereof, or agency of such political subdivision or municipality (including any corporation owned or controlled by any State, Territory, or Possession of the United States or by any such political subdivision, municipality, or agency), in connection with any activity which is financed in whole or in part by loans or grants made by the United States, or any department or agency thereof, uses his official authority for the purpose

of interfering with, or affecting, the nomination or the election of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, or Delegate or Resident Commissioner from any Territory or Possession, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

This section shall not prohibit or make unlawful any act by any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any state or political subdivision thereof, by the District of Columbia or by any Territory or Possession of the United States; or by any recognized religious, philanthropic or cultural organization.

18 USC § 1384 Prostitution near military and and naval establishments

Within such reasonable distance of any military or naval camp, station, fort post, yard, base, cantonment, training or mobilization place as the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or any two or all of them shall determine to be needful to the efficiency, health, and welfare of the Army, the Navy, or the Air Force, and shall designate and publish in general orders or bulletins, whoever engages in prostitution or aids or abets prostitution or procures or solicites for purposes of prostitution, or keeps or sets up a house of ill fame, brothel, or

bawdy house, or receives any person for purpose of lawdness, assignation, or prostitution into any vehicle, conveyance, place, structure, or building, or permits any person to remain for the purpose of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure, or building or leases, or rents or contracts to lease or rent any vehicle, conveyance, place, structure or building, or part thereof, knowing or with good reason to know that it is intended to be used for any of the purposes herein prohibited shall be fined not more than $1,000.00 or imprisoned not more than one year, or both.

The Secretaries of the Army, Navy and Air Force and the Federal Security Administrator shall take such steps as they deem necessary to suppress and prevent such violations thereof, and shall accept the cooperation of the authorities of States and their counties, districts, and other political subdivisions in carrying out the purpose of this section.

This section shall not be construed as conferring on the personnel of the Departments of the Army, Navy or Air Force or the Federal Security Agency any authority to make criminal investigations, searches, seizures, or arrests of civilians charged with violations of this section.

18 USC § 1385 Use of Army and Air Force as posse comitatus

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000.00 or imprisoned not more than two years, or both.

Secretary of the Navy Instruction 5400.12

provides that:

> . . . throughout the United States, it is a fundamental policy to use civilian, rather than military, officials and personnel to the maximum extent possible in preserving law and order. In the Federal government this policy is reflected by the Posse Comitatus Act (18 USC 1385) which prohibits the use of any part of the Army or Air Force to enforce local, state, or Federal laws except as Congress may authorize. Although not expressly applicable to the Navy and Marine Corps, that act is regarded as a statement of Federal policy which is closely followed by the Department of the Navy. SECNAVINST 5400.12, p. 2 (January 17, 1969).

STATEMENT OF THE CASE AND FACTS

Federal jurisdiction was invoked when the government initiated this action in the United States District Court for the Eastern District of Virginia against appellants, Ruby Davidson Walden and William Luther Walden. Ruby Davidson Walden was charged with, to-wit: Conspiracy to commit offense or to defraud the United States, Section 371, Title 18, USC; Selling Firearms to a person under twenty-one years of age, Section 922 (b) (1), Title 18, USC; and selling firearms to a person not a resident of the State where the licensee is doing business, Section 922(b) (3), Title 18, USC. William Luther Walden was charged with, to-wit: Conspiracy to commit offense or to defraud the United States, Section 371, Title 18, USC; and Selling Firearms to a person under twenty-one years of

age, Section 922 (b) (1), Title 18, USC. A search warrant was issued of January 10, 1972, and certain transaction records were seized at that time.

An indictment was returned during the February, 1972, term in four Counts, to-wit:

Count I - charged Ruby Davidson and William Luther Walden with conspiracy;

Count II - charged Ruby Davidson Walden with selling firearms to a person under twenty-one years of age;

Count III - charged William Luther Walden with selling firearms to a person under twenty-one years of age; and

Count IV - charged Ruby Davidson Walden with selling firearms to a person who did not reside in Virginia.

On March 2, 1973, a Motion to Dismiss Indictment or to Quash Warrant and Strike Testimony was filed and later Memoranda

submitted. Upon timely answer, the Motion was denied.

At the end of all of the evidence at trial, Hon. Judge Bryan, Jr., dismissed Count I of the indictment stating that there was not enough evidence to submit the conspiracy Count to the Jury.

The Jury then rendered a verdict finding Ruby Davidson Walden not guilty of Count II and guilty of Count IV and judgment was so entered. A guilty verdict and judgment were entered against William Luther Walden on Count III.

Some time prior to the Waldens' arrests, Special Investigator Carl W. Windsor, Jr., engaged the assistance of members of the United States Marines in his investigation of suspected violations of Federal Firearms Law. Special Investigator Windsor was successful in recruiting then active duty Marines, David L. Durham, Vernon Eugene Albery, and

Arthur B. Coleman, III, allof whom subsequently participated in said investigations. At least some of this recruiting took place under the auspices of and with the assistance from a Marine Staff Sergeant Methany.

The net result of this Marine Corps -- Treasury Department cooperation was to send forward, as military agents, corporals, Durham, Albery and Coleman.

Over counsel's preliminary objection, Mr. Durham was permitted to testify that he and a fellow Marine, Corporal Albery entered defendants' store to buy a gun. Mr. Durham, at that time, was not twenty-one years of age. Mr. Durham alleged that he paid Mrs. Walden for the gun, received it from her, but that Corporal Albery signed the necessary forms required by Federal Law. Additionally, Mr. Durham testified that after he was twenty-one years of age he went

into defendants' store with another fellow Marine, Corporal Coleman, then twenty years of age. Mr. Durham alleged that Corporal Coleman paid for a weapon and then, he, Mr. Durham, signed the necessary forms required by Federal Law.

Mr. Durham also testified that after he had obtained the legal age of twenty-one years he entered the defendants' store with Special Investigator Clowser, a resident of Maryland, and purchased a firearm. Mr. Durham signed the necessary forms for the purchase of a firearm and was handed a receipt by Ruby Walden.

After Agent Clowser received the weapon a receipt was executed between Mr. Durham and Agent Clowser stating, "Sold from David Durham to Mr. Clowser".

Marine Corporal Vernon Eugene Albery, Marine Corporal Arthur B. Coleman, III, and Special Investigator William Lester Clowser testified to essentially the

same facts as Mr. Durham.

Special Investigator Carl W. Windsor testified that he engaged the Marine Corps in the investigation of the defendants.

Subsequent to the testimony of the witnesses for the government, counsel moved for acquittal on the basis that the prosecution had not shown at any time that the defendants made a sale to a person under twenty-one years of age and that the involvement of the United States Marine Corps was a direct violation of 18 USC S1385. However, the Motion was denied.

A R G U M E N T S

I. The Circuit Court Erred By Not Suppressing Evidence It Found To Have Been Gathered Illegally.

The Circuit Court unequivocally found that violations of military law (Navy Instruction 5400.12) led to the Walden convictions. The evidence was, according to the Circuit Court, obtained illegally.

The Circuit Court refused, however, to suppress the evidence. The effect of this decision leaves two individuals standing convicted before the federal bar on the basis of evidence that could not have been obtained but for illegal governmental investigative procedures. Is this the level of judicial dignity to which the Supreme Court will permit federal courts to fall? McNabb v. Mallory, 318 US 608 (1943) clearly says no.

II. The Circuit Court Erred When It Refused to Decide a Properly Preserved Constitutional Question When the Resolution of all Other Issues did not result in a Reversal of Defendants' Convictions.

The Circuit Court states in its opinion:

> In this case, because the Secretary of the Navy Instruction, viewed alone and in the light of the Posse Comitatus Act, affords a non-constitutional standard for judging the legality of the Military action, we do not find it necessary to interpret relative unexplored sections of the Constitution in order to determine whether there might be constitutional objection to the use of the military to enforce civilian laws.

Well, this would have been more than satisfactory to petitioners if the Court had suppressed the evidence on these non-constitutional grounds. The fact is that the Court did not do so, and could not have adjudicated all of petitioners' rights without passing on the constitutional issue raised throughout this case.

Petitioners have made a bona fide claim that their constitutional right to be free from military instrusion into civil

McNabb, of course, was an exercise of the Court's supervisory power over the federal judicial system. McNabb set down rules peculiarly applicable to the present case. In both cases violations of federal law (in McNabb - statutory law, here - regulatory law) by the government during the course of a criminal investigation resulted in gathering of prejudicial evidence. Two passages from McNabb make clear why suppression is required:

> "Plainly a conviction resting on evidence secured through such a flagrant disregard of the procedures which Congress has commanded cannot be allowed to stand without making the Courts themselves accomplices in wilful disobedience of the law. McNabb v. United States 318 US at 345 (1943).

and

> "Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the Federal Courts would stultify the policy which Congress has enacted into law. McNabb v. United States 318 US 332 at 345 (1943).

matters was violated. It seems very clear that the Circuit Court could abstain from answering petitioners' constitutional claim only by suppressing the evidence on some non-constitutional ground.

III. The investigative procedures used by the Government were in violation of the Federal Constitution.

A careful study of the legislative history of the Posse Comitatus Act 18USC reveals the sponsors and supporters of the statute did not intend to proscribe the acts enumerated in the statute rather they intended to provide a penalty for acts which had been illegal every since the ratification of the United States Constitution. For example, Seantor Kernan from New York stated:

> I suppose no one claims that you can use the Army as a pssse comitatus unless that use is authorized by the Constitution, which it clearly is not, or by Act of Congress. The Constitituion authorizes its use to repel the invasions of a State and to Suppress domestic insurrection, or the call of the Legislature if in session, or, if it be notin session, on call of the governor. 7 Cong. Rec. 4240.

Or as Senator Merrimon of North Carolina explained:

> The Army, under the Constitution, is not to be used for the purpose of executing the law in the ordinary sense of executing the law. It can only be called into active service for the purpose of suppressing insurrection, where there is organized resistance against the Government in the execution of the law. 7 Cong. Rec. 4243.

Or as Senator Hill from Georgia so vehemently argued,

> Whenever the idea obtains that you need a military power to govern the great body of people of this country you have given up the fundamental theory of your system of government; it is gone. I care not by what agency it is brought about the fact will remain that whenever you need the military arm habitually, or in better language, whenever your conclude that it is right to use the Army to execute civil process, to discharge those duties that belong to civil officers and to citizens, then you have given up the character of your government; it is no longer a government for liberty; it is no longer government founded in the consent of the people; it has become a government of force. The Army is a government of force it has no civil functions in the proper sense of theterm.
> 7 Cong. Rec. 4247.

It is clear that the solicitation of aid from the Marine Corps was an unconstitutional and therefore impermissible usurpation of authority by the civilian officials. No where in the Constitution is such activity authorized.

Even in 18 USC § 1384 (Appendix p.2) where Congress permitted the military to take steps to prevent prostitution within a reasonable distance of military installations, such steps could only be taken by designated civilian authorities within the military and while cooperation with State and local authorities was permitted, the military was prohibited from makein" . . . criminal investigations, searches, seizures, or arrests of civilians charged with violations of this section." It should be noted that this is the only section in the United States Code, where Congress has authorized the Military to enter into an area limited to civilian authorities without petition of the

legislature or the governor to the President of the United States and with his authorization. It should further be noted that the scope of such authorization is limited in physical area; subject matter and power.

In a recent decision concerning military surveillance of civilians, Laird v. Tatum, 40 LW. 4850 (1972), the majority of the Court found that while there was no justiciable controversy in that respondents failed to show objective harm or threat of specific future harm, cases which can show any recognizable injury would not go unnoticed and cases which involved unlawful activity of the military would not go unremedied.

Mr. Chief Justice Burger discusses the traditions of civilianism and what protections the Court is prepared to provide in the event of a real or truly threatened military intrusion.

"The concerns of the Executive and Legislative Branches in response to disclosure of the Army surveillance activities - and indeed the claims alleged in the complaint - reflect a traditional and strong resistance of Americans to any military instrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime. Indeed, when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.
Laird v. Tatum, 40 LW. 4850 at 4854 (1972).

Justice Douglas in his dissenting opinion

pointed out:

The action in turning "armies" loose on surveillance of civilians was a gross repudiation of our traditions. The military, though important to us, is subservient and restricted purely to military missions. " Id. 4856.

Military missions do not include the investigation of suspected violators of federal firearms laws. For as the founding fathers realized in a free country the military protects citizens from attachs from without. A society which uses its military to protect it from itself is a society devoid of liberty.

IV. Evidence obtained in violation of the Federal Constitution must be suppressed.

The next question, of course, is notwithstanding the fact that the Constitution of the United States has been violated, notwithstanding the fact that proper procedures were not followed and notwithstanding the fact that the evidence was obtained as a result of all the previously mentioned facts, sould the evidence be suppressed?

the fifth and Fourteenth Amendments to the United States Constitution provide that no person shall be "deprived of life, liberty, or property without due process of law".

. It has been held that "the due process

clauses of both the Fifth and Fourteenth Amendments are directed at the protection of the individual, and he is entitled to their immunity as much as against the state as against the national government," Curry v. McCanless, 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339.

The due process clause in Common Law countries dated back to the signing of the Magna Charta. In 1215, the nobles of England forced King John to concede that even the kind must obey the law and follow established procefures before he could deprice a subject of life, liberty or property. "The phrase 'due process of law' is an equivalent of the phrase 'law of the land' in Magna Charta. " Davidson v. New Orleans, 96 U.S. 97, 24 L.Ed. 616; Twining v. New Jersey, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 93.

"The words 'law of the land' as used

in Magna Charta implied a conformity with the ancient and customary laws of the English people, or laws enacted by Parliament. "Davidson v. New Orelans, 96 U.S. 97, 24 L.Ed 616.

> The Magna Charta provision that 'no man ought to be taken or imprisoned, or deprived of his life, liberty, or property, but by the judgment of his peers, or by thelaw of the land' . . . was intended to secure the individual from arbitrary exercise of the powers of the government, unrestrained by the established principles or private rights and distributive justice. Bank of Columbia v. Okely, 4 Wheat 235.

How can an individual be secure from "the arbitrary exercise of the powers of the government" if investigators in the United States Treasury Department and Members of the Marine corps can conspire to violate the laws of the land and are then rewarded by the courts for such violations? Surely, defendants' conviction must be interpreted as a reward, for while the Constitution and the laws have been ignored and a basic foundation of freedom is lost,

the conspiracy has achieved its stated objective which was to secure convictions of the defendants.

If the police can violate the United States Constitution, can violate the laws of the United States, can solicit violations of the United States Constitution, can solicit active duty soldiers to violate military law and the military can violate the Constitution and laws of the United States as well as their own regulations and are both encouraged to do so by courts which permit the fruits of this unfortunate harvest to serve as the basis for conviction, then where is respect of law and observance of due process to be found? There is only one way to insure respect for law and that is for the Courts to insist that those charged with enforcing the law set the best of examples. For the Courts to do less, would place the Courts in a position of condemning the

individual for breaking the law, yet on the other hand encouraging the police to do so. The hypocracy of such a position is obvious. The only way that Courts can insist that those charged with enforcing the law are not encouraged to violate it under these circumstances is to suppress the illegally obtained evidence.

As the Supreme Court of the United States has stated, "A conviction resting on evidence secured through a flagrant disregard of the procedures which Congress has commanded cannot be allowed to stand without making the Courts themselves accomplices in willful disobediance of law." McNabb v. United States, 318 U.S. 332, 345; Elkins v. United States, 364 U.S. 206, 223.

The United States Supreme Court has stated time and again that illegally and unconstitutionally obtained evidence may not be permitted to undermine our system of justice. In Mapp v. Ohio, 367 U.S. 643, 81

S.Ct. 1684, 6 L.Ed. 2d 1081 (1961), it stated:

> The criminal goes free if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse its disregard of the character of its own existence. Mapp, at 659.

In Elkins v. United States, 364 U.S. 206, the Silver Platter Doctrine was declared invalid:

> Yet when a federal court sitting in an exclusionary state that admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution. Elkins, at 208.

As Luther Martin of Maryland stated at the Constitutional Convention ". . . when a government wishes to deprive its citizens of freedom and reduce them to slavery, it generally makes use of a standing army." Laird v. Tatum, 40 L.W. 4850, 4855 (1972).

In the SEnate debates over the bill

which was to become 18 USC § 1385,

Senator Merrimon of North Carolina stated:

> The Army is the reserved power of the nation to be used only in the last extremity. The army of the nation cannot be employed for ordinary purposes. The truth is that whenever this is done, if this doctrine is to prevail in this country, it will be a long way in the march toward absolute despotism.
>
> Mr. Kirkwood: If the army helps in enforcing the law, it is despotism!
>
> Mr. Merrimon: Oh, no; it is not enforcing the law, it is subverting the law.
>
> 7 Cong. Rec. 4244.

It does indeed subvert the law. For to permit the evidence obtained as a result of this illegal operation would be to declare that the Constitution of the United States no longer governs the land and that the military is no longer governed by Congress. It was the boast of the founding fathers that the United States, unlike most countries on the earth is a free country, governed by the will of those who inhabit it, that the military

force was not established to enforce the laws, was not established to force the population into submission, was not established to serve as the armed force of the country subject only to the whim of the local sheriff. No, the Armed Forces of the United States was established to repel invasion.

It is clear that this type of activity, if permitted to continue, would encourage unchecked military activity heretofore forbidden by the laws of the land, would remove an important safeguard which has kept this country free from executive and military tyranny for almost 200 years, and would open the door to a mobile national police force at the disposal and discretion of any law enforcement official. For while the police and the marines may claim that they were only trying to put an end to the firearms violations, Justice Brandeis warned us long ago, "That experience should teach

us to be most on our guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lerk in invideous encroachment by men of zeal, well meaning but without understanding." Olmstead v. United States, 277 U.S. 438.

The paths open to Special Investigators, Clowser and Windsor, were many; they could have used other Special Investigators or civilians. However, in their zeal they did not explore those alternative but simply turned to what was for them expedient but what was for the Republic most perilous. Such action cannot be tolerated; for a nation which permits subversion of its laws, its Constitution, its traditions, its principles and its spirit will find greatness an experience of the past.

Respectfully
Submitted,

FRANK B. TAVENNER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA :

vs. : Criminal No.59-72-A

RUBY DAVIDSON WALDEN :

O R D E R

ON THIS 7th day of April, 1972, came the attorney for the government and the defendant appeared in his own proper person and by counsel,

and the defendant being charged with the offense of violation of Count 2 Unlawful sale of firearms; 18USC922 (b) (1), 924 (a) (2) & (22)(b) (3). as charged in the indictment, and *(having waived formal arraignment), entered a plea of not guilty, and the evidence being fully heard,

IT IS ADJUDGED that the defendant, Ruby Davidson Walden, is not guilty of Count 2.

Alexandria, Va.
Dated: April 7, 1972

U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-1931

United States of America,

Appellee,

vs.

Ruby Davidson Walden and
William Luther Walden,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Before HAYNSWORTH, Chief Judge, WINTER and BUTZNER, Circuit Judges.

Argued October 4, 1973 Decided: January 10, 1974

Frank B. Tavenner for Appellants; Brian P. Gettings, United States Attorney, (K. Gregory Haynes, Assistant United States Attorney, on brief) for Appellee.

WINTER, Circuit Judge:

Ruby Walden and William Walden were convicted by a jury of violating the federal firearms law's prohibitions against sales to minors and non-residents, 18 U.S.C. §§ 922(b) (1), 922(b) (3) and 924(a), and they appeal. The bulk of the government's proof of their guilt was the product of an undercover investigation carried out in large part by several Marines at the request of a Special Investigator of the Alcohol, Tobacco and Firearms Division of the U.S. Treasury Department. Defendants sought, both by pretrial motion to suppress and at trial, to exclude the testimonial evidence produced by the Marines' investigation on the ground that the investigation violated the Posse Comitatus Act of 1878, 18 U.S.C. § 1385, and various military regulations prohibiting use of the armed services to enforce civilian laws.

We do not think that the letter of the Act was violated. We conclude, however, that there was a violation of the regulations; but, because this case presents the first instance of which we are aware in which illegal use of military personnel in this manner has been drawn into question, we decline to impose the extraordinary remedy of an exclusionary rule at this time, or to reverse the judgments. We reserve, however, the possibility that such a rule may be called for should repeated cases involving military enforcement of civilian laws demonstrate the need for the special sanction of a judicial deterrent. We affirm the judgments entered on the convictions.

I.

William and Ruby Walden, husband and wife, both worked in a department store in Quantico, Virginia, the site of a Marine Corps; base. Their convictions of

federal firearms violations were based on the following modus operandi, which was established by testimony of three enlisted Marines[1] and a Treasury Agent, all of whom purported to be ordinary firearm purchasers while actually working as undercover agents. At the Waldens' suggestion, a minor or non-resident of Virginia, ineligible under federal law to purchase a firearm, would bring a qualified purchaser to the store to sign the federal firearm transaction record. While the qualified buyer appeared as the purchaser of record, the actual purchaser selected the weapon, paid the purchase price, and took possession. The Waldens would prepare a receipt showing transfer of the weapon from the

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1. The parties dispute whether one of the undercover agents was still a Marine at the time of the three sales involved in this case. In light of our disposition of the case, it is not necessary to resolve this factual question.

qualified purchaser to the actual buyer. In the instance where the actual buyer was a minor, the receipt was made effective as of the date that the minor achieved majority.

II.

The use of Marines as undercover investigators by the Treasury Department is counter to a Navy military regulation proscribing the use of military personnel to enforce civilian laws. Secretary of the Navy Instruction 5400.12 provides that:

> [t]hroughout the United States, it is a fundamental policy to use civilian, rather than military, officials and personnel to the maximum extent possible in preserving law and order. In the Federal Government this policy is reflected by the Posse Comitatus Act (18 USC 1385) which prohibits the use of any part of the Army or Air Force to enforce local, state, or Federal laws except as Congress may authorize. Although not expressly applicable to the Navy and Marine Corps, that act is regarded as a statement of Federal policy which is closely followed by the Department of the Navy. SECNAVINST 5400.12, p. 2 (January 17, 1969).

Thus, though by its terms the Posse Comitatus[2] Act[3] does not make criminal the use of Marines to enforce federal laws, the Navy has adopted the restriction by self-imposed administrative regulation.[4] Cf. United States v. Heffner, 420 F. 2d 809 (4 Cir. 1969).

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2. The term "posse comitatus" is defined as "[t]he poser or force of the county. The entire population above the age of 15, which a sheriff may surmon to his assistance in certain cases; as to aid him in keeping the peace, in pursuing and arresting felons, etc. 1 Bl. Comm. 343; Com. v. Martin, 7 Pa. Dist. R. 224." Black's Law Dictionary 1324 (rev'd 4 ed. 1968).

3. "[W]hoever, except in cases and under circumstances expressly authorized by the Constituion or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise, to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1385.

4. Secretary of the Navy Instruction 5400.12 was issued on January 17, 1969. Thus, it was promulgated after Deputy Secretary of Defense Paul Nitze issued DoD Directive 3025,12 on June 8, 1968, and before Deputy Secretary of Defense

4. continued -

David Packard cancelled and replaced the 1968 DoD Directive with a new DoD Directive, dated August 19, 1971, having the same number. The two DoD Directives have a very similar format and much of the later is a verbatim copy of the earlier. However, the following part of the earlier Directive, relevant to this case, was not carried forward:

> The Posse Comitatus Act (18 U.S.C. 1385) prohibits the use of any part of the Army or Air Force to execute local, state or Federal laws except as Congress may authorize. Although the Navy and Marine Corps are not expressly included within its provisions, the act is regarded as national policy applicable to all military services of the United States. (Emphasis added). DoD Directive 3025.12 (June 8,1968) 32 C.F.R. § 187.4(b) (1971), superseded by DoD Directive 3025.12 (August 19, 1971) , 32 C.F.R. § 215.4 (1973).

However, the material in the part of the 1971 Directive in which this language was omitted was worded substantially differently from its predecessor and contained significant new material. The implication of an intentional change in policy for the Navy and Marines is no stronger than the implication that the omission was simple inadvertance. The general thrust of the Directive -- limiting use of the armed forces in civilian affairs and requiring high level authorization for the few exceptions -- makes the implication of non-deliberate omission almost conclusive.

4. continued -

Furthermore, the hypothesis that the Department of Defense may have intended a change in policy by omitting the language extending the Posse Comitatus Act to the Navy in the second DoD Directive is rendered untenable by the continued effectiveness of the Secretary of the Navy Instruction. The second DoD Directive Concluded by stating in division XII on Implementation that:

> A. Military department, JCS, and Defense agency directives, instructions, or plans for the use of military resources in the event of civil disturbances will be reviewed and revised as necessary within 60 days from the date of this directive: (1) to agree with the provisions of this directive, and (2) to conform with the policies and guidance promulgated by the DoD Executive Agent.
>
> B. Implementing directives, instructions, or plans revised or developed by DoD components under assignment herein will be furnished to the DoD Executive Agent for review. (Emphasis added). (Not printed in Federal Register or Code of Federal Regulations).

In light of the command that subordinate agencies in the Department of Defense revise their regulations to conform with the DoD Directive, the Secretary of the Navy would have amended Instruction 5400.12 by deleting the language extending the Posse Comitatus Act to the Navy if any change in policy had been intended.

The Navy's administrative extension of the policy of the Posse Comitatus Act does not contravene any congressional purpose to exclude Marines and other Navy personnel from the Act's coverage. Congress omitted coverage of Naval forces presumably because the Act was a rider to an Army Appropriations Bill, and in its original form was designed to deny the use of the appropriation bill's funds for troops which violated the Act. See Act of June 18, 1878, $15, 20 Stat. 152 (1878) (now 18 U.S.C. § 1385), Note, Honored in the Breach: Presidential Authority to Execute the Laws with Military Force, 83 Yale Law Journal 143 N 96 (1973). The Act applies to the Air Force because the Air Force originated as part of the Army and housekeeping legislation maintained the coverage of legislation formerly applicable only to the Army.[5] Thus, the failure to include

the Navy in the text of the Act cannot be read as congressional approval of the use of Navy personnel to enforce civilian laws.

Indeed, consideration of the legislative history of the Act and interpretative opinions reveals a policy applicable to all of the armed services. See, e.g. Wrynn v. United States, 200 F.S. 457, 464-65 (E.D. N.Y. 1961). Congressman Knott, who introduced the bill, stated:

> But this amendment is designed to put a stop to the practice, which has become fearfully common of military officers of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws. 7 Cong. Rec. 3849 (Emphasis added).

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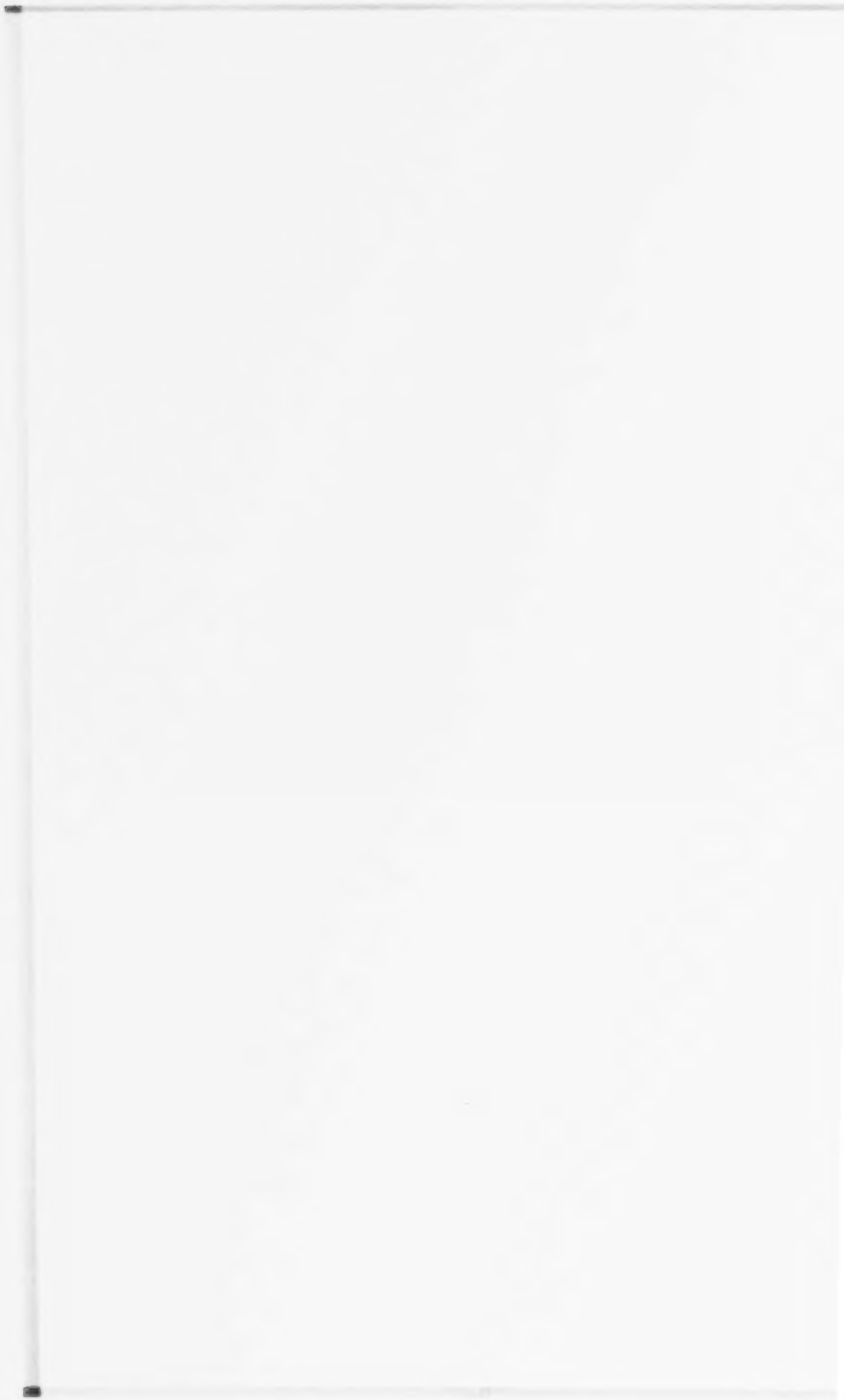
5. When a separate Department of the Air Force was created from the Army, Congress provided that statutes, such as the Posse Comitatus Act, continued to apply to the Air Force despite the transfer. See National Security Act of 1947, §§ 207(a), 208 (a), 305 (a), ch. 243, 61 Stat. 502 (1947). Then, in



The policy that military involvement in civilian law enforcement should be carefully restricted has deep roots in American history.[6] Whether there should even be a standing army was a question fiercely debated among the framers of the Constitution. In the congressional debate on the Posse Comitatus Act, several senators expressed the opinion that the Act was no more than an expression of constitutional limitations on the use of the military to enforce civil laws.

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5. continued -

1956, when Congress revised, codified, and enacted into law Title 10 of the United States Code, the language of the Posse Comitatus Act was restated -- though without substantive change -- and the words "Air Force" were included in the text. See Act of August 10, 1956, §§ 18 (a), 49 (a), 53 ch. 1041, 70A Stat. 1, 626 (1956) (10 U.S.C. § 15 repealed and replaced by 18 U.S.C. § 1385).

6. See Sparks, National Development 1877-1885, 23 The American Nation, A History 127 (Posse Comitatus Act reflected "the inherited antipathy of the American to the use of troops for

See 7 Cong. Rec. 4240 (remarks of Senator Kernan); 7 Cong. Rec. 4243 (remarks of Senator Merrimon).

Recently, Chief Justice Burger, in writing for theCourt, addressed the subject of the separation of military and civilian affairs.

> The concerns of theExecutive and Legislative Brances in response to disclosure of the Army surveillance activities - and indeed the claims alleged in the complaint - reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendement's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime. Indeed, when presented

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6. continued -

civil purposes") cited with approval in Wrynn v. United States, 200 F.S. 457, 465 (E.D. N.Y. 1961).

> With claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied. Laird v. Tatum, 408 U.S. 1, 15-16 (1972).

In this case, because the Secretary of the Navy Instruction, viewed alone and in the light of the Posse Comitatus Act, affords a non-constituional standard for judging the legality of the Military action, we do not find it necessary to interpret relatively unexplored sections of the Constituion[7] in order to determine whether there might be constitutional objection to the use of the military to enforce civilian laws.

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7. See, e.g. Article I, § 8; § 4; Third Amendment.

Nonetheless, our interpretation of the scope and importance of the letter and spirit of the Posse Comitatus Act and the Navy regulation as standards governing primary behavior is influenced by the traditional American insistence on exclusion of the military from civilian law enforcement, which some have suggested is lodged in the Constitution. Thus, interpreting the Secretary of the Navy Instruction within this context, we are reinforced in our conclusion that the Marines in this case violated the Navy's own regulation.

III.

Our conclusion that the use of Marines in the criminal investigation of defendants, and evidence derived therefrom at their trial, violated the Secretary of the Navy's Instruction presents the questions of whether we should reverse the judgments appealed from and whether we should instantly or prospectively create an exclusionary

rule for this and future cases as an appropriate remedy for violation of this military regulation.

In the appeals at bar, the evidence of defendant's guilt is overwhelming. While the bulk of the evidence was obtained by violating the Instruction, there is totally lacking any evidence that there was a conscious, deliberate or willful intent on the part of the Marines or the Treasury Department's Special Investigator to violate the Instruction or the spirit of the Posse Comitatus Act. From all that appears, the Special Investigator acted innocently, albeit ill-advisedly. The Instruction provides no mechanism for its enforcement[8] and the Act, where it is

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8. While a violation of lawful general orders or regulations is normally an offense under Article 92 of the Uniform Code of Military Justice and thus cognizable in the Courts martial, the military regulation involved here "requires implementation

applicable, renders the transgressor liable to criminal penalties [9] but does not provide that "[t]he criminal is to go free because the constable has blundered." People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardoza, J.).

In criminal cases in which the police have violated an accused's Fourth Amendment rights in obtaining evidence of guilt, the result of freeing the guilty has been compelled, either because the "exclusionary

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8. continued -

by subordinate commanders to give it effect as a code of conduct" and thus "will not qualify as a general order for the purpose of an Article 92 prosecution" United States v. Scott, 22 U.S.C.M.A. 25, 46 C.M.R. 25, 27 1972; United States v. Nardell, 21 U.S.C.M.A. 327, 329, 45 C.M.R. 101, 103 (1972). See United States v. Woodrum, 29 U.S.C.M.A. 529, 43 C.M.R. 369 (1971); United States v. Tassos, 18 U.S.C.M.A. 12, 39 C.M.R. 12 (1968). Thus, the remedy of naval or marine discipline is probably unavailable. In any event military regulations could not affect the Treasury Department's Special Investigator who was the one who enlisted the prosecutorial services of the Marines.

rule is an essential ingredient of the Fourth Amendment, "Mapp v. Ohio, 367 U.S. 643, 651 (1961), or because currently available alternative remedies for Fourth Amendment violations have proved ineffectual. See Id. 367 U.S. at 652-53; Bivens v. Six Unknown Fed. Narcotic Agents, 403 U.S. 388, 411 (1971)(Burger, C.J., dissenting); Wolf v. Colorado, 388 U.S. 25, 41 (1949). (Murphy, J., dissenting); People v. Cahan, 44 Cal. 2d 434, 445, 282 P 2d 905, 911 (1955). (Traynor, J.) ("other remedies have completely

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9. See n. 3, supra

failed to secure compliance with the constitutional provisions").

But, putting aside the question of the effectiveness of an exclusionary rule as a deterrent to violations of the Fourth Amendment,[10] we do not find present in this case at this time the same considerations which required an exclusionary rule in the Fourth Amendment cases or in other instances where an exclusionary rule has been fashioned and applied. First, the proscription in the Instruction against the use of Marines in ordinary civilian criminal law enforcement was until today far less clear and far less widely known than the prohibition of the Fourth Amendment against unreasonable searches or the rules of court requiring an accused to be produced before a magistrate within a designated period

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10. See Bivens, supra, 403 U.S. at 411-27 (Burger, C.J., dissenting); Oakes Studying the Esclusionary Rule in Search and Seizure, 37 U of Chi. L. Rev. 665 (1970).

after apprehension. See McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957). Secondly, the Instruction expresses a policy that is for the benefit of the people as a whole, but not one that may fairly be characterized as expressly designed to protect the personal rights of defendants.[11]

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11. In this connection, it should be rembered that Congress has the express power "[t]o provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections, and repel Invasions . . .,"Const. Art. I, § 8, as well as the obligation to "guarantee to every State . . . a Republican Form of Government . . . [t]o protect each . . . against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence, "Const. Art. IV, § 4 Congress has responded by the enactment of 10 U.S.C. § 331:

> Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor

Cf. United States v. Heffner, supra. Thirdly, the fact that the Instruction provides no mechanism for its own enforcement, and especially no criminal sanction for its violation and that its legal effect was far from obvious, means that admission of the evidence of guilt does not require the court to condone "dirty business." See McNabb v. United States, supra, 318 U.S. at 345-46; Eleuteri v. Richman, 26 N.J. 506, 512, 141 A. 2d 46, 49 (1958) (Weintraub, C.J.); People v. Cahan, 44 Cal. 2d, 434, 445-56, 282 P 2d 905 (1955) (Traynor, J.).

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11. continued -

> if the legislature cannot be convened, call into Federal Service such of the militia of the other States in the number requested by that State, and use such of the Armed Forces, as he considers necessary to suppress the insurrection.

Thus, the Constituion recognizes that in certain circumstances, military preservation and enforcement of civilian law is appropriate; the policy consideration underlying the Posse Comitatus Act is not absolute.

More important than any of the foregoing is the fact that this case is the first instance to our knowledge in which military personnel have been used as the principal investigators of civilian crimes in violation of the Instruction. We are not aware from the reported decisions of other courts that there has been any other violation, let alone widespread or repeated violations.

Even though we sustain defendants' convictions, we have no reason to fear that others will be sought or obtained in violation of the Instruction now that we have expressed our view of its scope and effect. Nor is there reason to doubt that the military, now that we have declared the effect of the Instruction, will fail to take steps to provide a mechanism to enforce it.

For all of these reasons, we therefore decline to reverse defendants' convictions or to impose the extraordinary remedy of an

exclusionary rule at this time. Should there be evidence of widespread or repeated violations in any future case, or ineffectiveness of enforcement by the military, we will consider ourselves free to consider whether adoption of an exclusionary rule is required as a future deterrent.

A F F I R M E D.

CERTIFICATE OF SERVICE

I hereby certify that a true of the foregoing Petition for Certiorari was mailed to Brian P. Gettings, U.S. Attorney, Post Office Building, Alexandria, Virginia, 22313, this 8th day of February, 1974.

Frank B. Tavenner

FRANK B. TAVENNER

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No. 73-1216

In the Supreme Court of the United States

OCTOBER TERM, 1973

RUBY DAVIDSON WALDEN AND WILLIAM LUTHER WALDEN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1216

RUBY DAVIDSON WALDEN AND WILLIAM LUTHER WALDEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners Ruby Davidson Walden and William Luther Walden were convicted of making illegal sales of firearms, in violation of 18 U.S.C. 922. They were fined $500 and $100, respectively. The court of appeals affirmed (Pet. App. 36-57). Petitioners contend that the evidence against them should have been suppressed because it was obtained by three young enlisted Marines working voluntarily in concert with an undercover Treasury agent.

The events leading to the prosecution began when Marine Corporal David L. Durham visited petitioners' store with the intention of buying a firearm (Tr. 20).[1] Petitioner Ruby Davidson Walden informed him that she

[1] "Tr." refers to the transcript of the proceedings at trial.

could not sell a firearm to him because he was under twenty-one, but she suggested that he bring a friend over that age who could sign the necessary papers as buyer (Tr. 3-4, 20). Durham talked about this suggestion with his supervisor, a Staff Sergeant, who reported the matter to a special investigator of the Alcohol, Tobacco, and Firearms Division of the Department of Treasury (Tr. 20, 68-69). At the request of the special investigator, Durham returned to petitioners' store accompanied by a slightly older friend, Corporal Vernon E. Albery (Tr. 7, 20-21), and the sale of the firearm to Durham was effected in the manner which had been suggested by petitioner Ruby Davidson Walden (Tr. 7-9).

After his twenty-first birthday, Durham returned to petitioners' store with a younger friend, Corporal Arthur B. Coleman, III, on whose behalf Durham signed the necessary papers as buyer of another firearm (Tr. 11-13). That sale was made by petitioner William Luther Walden (Tr. 11-12). One week later, Durham again went to petitioners' store, this time with an undercover Treasury agent posing as a customer; the agent informed petitioner Ruby Davidson Walden that he resided in another state, whereupon she told him that she would sell a firearm to him if Durham would sign as buyer, and after some show of hesitation on Durham's part the sale was completed in that manner (Tr. 13-16).

On appeal from their convictions, petitioners contended for the first time that the evidence against them should have been suppressed because it was obtained through an impermissible involvement by the military in civilian law enforcement. The court of appeals held that although the use of Corporal Durham and his friends as undercover agents violated Secretary of Navy Instruction 5400.12, which provides that "it

is a fundamental policy to use civilian, rather than military, officials and personnel to the maximum extent possible in preserving law and order" (Pet. 10), the evidence was not subject to suppression because (1) the violation of the Instruction was unintentional, (2) no personal rights of petitioners had been infringed, (3) exclusion was not required by "considerations of justice" (*McNabb* v. *United States*, 318 U.S. 332, 341), and (4) the problem was not shown to be a recurrent one calling for the drastic remedy of an exclusionary rule (Pet. App. 53-57).

Petitioners here contend that Corporal Durham's undercover work violated not only the Instruction but the Constitution as well, and that in either event the evidence against them was improperly admitted.

1. Petitioners' contentions were not properly before the court of appeals and are not properly raised here. Petitioners made no objection at trial to the introduction of the testimony of Corporal Durham and the other Marines and thus failed to preserve the issue for appellate review. See Rule 51, Fed. R. Crim. P. Since admission of the testimony was not clearly erroneous and did not adversely affect the integrity and fairness of petitioner's trial, there was no "plain error" to be noticed by the court of appeals under Rule 52(b), Fed R. Crim P.[2] See generally 3 Wright, *Federal Practice and Procedure: Criminal* 372-375.

2. In any event, petitioners' allegation of a constitutional violation is insubstantial. It is true, as this Court has observed, that there is in this

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[2]Under the proposed amendments of the Rules, promulgated by this Court on April 22, 1974, Rule 12(f) would require that petitioners' claim be treated as waived because not raised prior to trial. This amendment, we believe, simply reflects prior law.

nation "a traditional and strong resistance * * * to any military intrusion into civilian affairs." *Laird* v. *Tatum*, 408 U.S. 1, 15. Whether this resistance is given expression in the Constitution is a question that has yet to be decided. But this case involves no intrusion of the "military." The fact that Durham and his friends happened to be Marines was largely irrelevant to the course of events; they were not acting under orders or in any sense conducting a military operation. They were merely cooperating voluntarily, in their capacities as private citizens, in bringing petitioners to trial for illicit activities which petitioners themselves had brought forcibly to Durham's attention. Durham and his associates used no military equipment and invoked no military prerogatives; they just walked into the store as customers and availed themselves of the arrangements suggested by petitioners. Thus the constitutional issue petitioners raise is not presented by the facts of this case.

3. We disagree with the court of appeals' holding that the investigation here violated the Secretary's Instruction. In the first place, the language of the Instruction is merely precatory; it states a general policy of discouraging the use of military personnel in civilian law enforcement, but it does not purport to prohibit such use in all cases. Secondly, the Instruction is directed at the use of military personnel in "preserving law and order" (Pet. 10); this phrase, we believe, was intended to denote armed police activities, not the type of unarmed investigatory work involved here.

But even assuming *arguendo* that Durham's investigation violated the Instruction, we believe, for the reasons stated in Part III of the opinion below

(Pet. App. 49-57), upon which we rely, that the court of appeals correctly refused to extend the exclusionary rule to the evidence obtained in the course of that investigation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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No. 73-1216

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

RUBY DAVIDSON WALDEN
and
WILLIAM LUTHER WALDEN,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI

FRANK B. TAVENNER
Counsel for Petitioners
1819 H Street, N.W.
Washington, D.C.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1216

RUBY DAVIDSON WALDEN
and
WILLIAM LUTHER WALDEN,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI

On February 8, 1974, Petitioners, by counsel, filed a Petition for a Writ of Certiorari which raised a provocative, substantial, and urgent constitutional claim concerning impermissible military intrusion

into a civilian criminal investigation.

Sometime in April, 1974, [1] the Solicitor General, or more likely one of his subordinates, filed a Memorandum in Opposition to the Petition for a Writ of Certiorari. The Solicitor General, or more likely one of his subordinates, made the following argument on page 3 of his Memorandum:

> "1. Petitioners' contentions were not properly before the court of appeals and are not properly raised here. Petitioners made no objection at trial to the introduction of the testimony of Corporal Durham and the other Marines and thus failed to preserve the issue for appellate review. See Rule 51, Fed. R. Crim. P. Since admission of the testimony was not clearly erroneous and did adversely affect the integrity and fairness of petitioner's trial, there was no "plain error" to be noticed by the court of appeals

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[1] The Solicitor General, or more likely one of his subordinates failed to put the entire date on the Memorandum.

"under Rule 52(b), Fed. R. Crim. P. [2]See generally 3 Wright, Federal Practice and Procedure: Criminal 372-275.

"[2] Under the proposed amendments of the Rules, promulgated by this Court on April 22, 1974, Rule 12(f) would require that petitioners' claim be treated as waived because not raised prior to trial. This amendment, we believe, simply reflects prior law."

Plainly, Rule 51, requires no objection at trial. Petitioners made a pre-trial Motion to Suppress the evidence which was denied. Footnote 2 of his memorandum gives some indication of just how wide of the mark Mr. Bork or his subordinate was on this score.

On May 13, 1974, the petition was denied. The reasons for said denial are impossible to determine but since the Solicitor General's argument, reprinted above, seems to be his first line

opposition, it is assumed that this is the ground upon which the petition was rejected.

Shortly after May 6, 1974, the Solicitor General was informed of the misleading and false assertions in his memorandum by way of the letter reprinted below:

May 6, 1974

Robert H. Bork, Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Re: Ruby Davidson Walden
and
William Luther Walden
vs.
United States of America
No. 73-1216

Dear Sir:

I call attention to an error in your Memorandum for the United States in Opposition that I believe in all fairness you should correct.

On page three, you noted that the issue of use of the military for investigative purposes was never raised and that petitioners made no objection at the trial of the case. If you had taken time to look at the record you would have seen that a timely motion to

suppress was filed and a hearing had which was rejected by the trial Judge, Albert Bryan. Under the rules, this was proper and timely and the error was raised.

Out of fairness, you should correct the record.

Yours very truly,

FBT:tm FRANK B. TAVENNER

cc: Clerk, U.S. Supreme Court

But for the apparent negligence of the Solicitor General or his subordinates, argument number one, reprinted above, would never have been made. It was for that reason that no reply brief was filed. It was hoped that the Solicitor General would see clearly the error of his ways and be quick to so inform the Court rather than requiring petitioners to bear the financial burden of this task. To this date, so far as can be determined, the Solicitor General has let stand this

erroneous statement.

It is easy to understand how an individual such as the Solicitor General or his subordinate, so removed and distant from trial practice, could have made this error in the first instance. It is, I submit, impossible to understand how this individual could allow an erroneous statement to stand in the face of the above reprinted letter.

Due to the above discussed intervening factors and to the urgency of petitioners' substantial constitutional claim, it is respectfully requested that the Court rescind its prior denial and grant petitioners a Writ of Certiorari.

Respectfully submitted,

FRANK B. TAVENNER
Counsel for Petitioners

May, 1974

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Rehearing of Order on Petition for Writ of Certiorari was mailed, postage prepaid, to Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530, this 30th day of May, 1974.

I further certify that this Petition for Rehearing is made in Good Faith and not for purposes of delay.

Frank B. Tavenner

FRANK B. TAVENNER
Counsel for Petitioners